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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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7 JUSTIN CASTILLO,

8 Plaintiff,

9 v.

10 CAESARS ENTERTAINMENT  
11 CORPORATION, et al.,

12 Defendants.

Case No. 18-cv-05781-EMC

**ORDER GRANTING DEFENDANTS'  
MOTION TO TRANSFER**

Docket No. 20

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Plaintiff Justin Castillo has filed a class action against Defendants Caesars Entertainment Corporation and Desert Palace, LLC (collectively, “Caesars”), asserting a violation of the Telephone Consumer Protection Act (“TCPA”). According to Mr. Castillo, Caesars violated the statute because it sent unsolicited marketing and advertising text messages to its hotel guests. Currently pending before the Court is Caesars’s motion to dismiss for lack of personal jurisdiction, or, in the alternative, to transfer venue pursuant to 28 U.S.C. § 1404. Having considered the parties’ briefs and accompanying submissions, as well as the oral argument of counsel, the Court agrees with Caesars that personal jurisdiction is lacking. However, because a lack of personal jurisdiction is a defect capable of being cured, the Court shall transfer the case, instead of dismissing it outright, to the District of Nevada pursuant to 28 U.S.C. § 1631. In the alternative, the Court holds that, even if it does have personal jurisdiction over Caesars, transfer is appropriate pursuant to § 1404.

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**I. FACTUAL AND PROCEDURAL BACKGROUND**

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In his complaint, Mr. Castillo alleges as follows.

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Mr. Castillo resides in Los Angeles, California. In April 2018, he checked into the Caesars Palace hotel, which is located in Las Vegas, Nevada. *See* Compl., ¶¶ 6, 16. Approximately half

1 an hour later, he received the following message:

2 Hi! I'm Ivy, your personal concierge at Caesars Palace. Text me for  
3 hotel information, towels, housekeeping requests and more. Text  
4 STOP to quit. Info/terms: j.mp/IvyTerms. I look forward to assisting  
you during your stay. Text me your first request now!

5 Compl., ¶ 16. At the time he received the text message, Mr. Castillo had not authorized Caesars to  
6 send him marketing-related text messages. *See* Compl. ¶ 19. Mr. Castillo does not allege that he  
7 received any more messages from Caesars.

8 According to Mr. Castillo, Caesars worked with GoMoment, a California-based company,  
9 “to roll out [the] guest-engagement platform known as” Ivy. Compl. ¶ 10. As alleged in the  
10 complaint, GoMoment was responsible for developing and maintaining the Ivy platform, but  
11 Caesars was responsible for implementing the platform for its hotel. *See* Compl. ¶¶ 11-12.

## 12 II. DISCUSSION

13 Caesars initially moves for a dismissal of the instant case based on lack of personal  
14 jurisdiction. *See* Fed. R. Civ. P. 12(b)(2). Because Mr. Castillo does not claim that this Court has  
15 general jurisdiction over Caesars, it need only consider whether there is specific jurisdiction. At  
16 this juncture in the proceedings, Mr. Castillo need only make a *prima facie* showing of specific  
17 jurisdiction. *See Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977)  
18 (noting that, where no evidentiary hearing is held and a court simply receives written materials  
19 from the parties, “a plaintiff must make only a *prima facie* showing of jurisdictional facts through  
20 the submitted materials in order to avoid a defendant’s motion to dismiss”).

21 Although a *prima facie* showing is not a high threshold, Mr. Castillo has nevertheless  
22 failed to make the requisite showing in the instant case. A critical element of specific jurisdiction  
23 is that the defendant must have purposefully availed itself of the privilege of conducting activities  
24 in the forum state or purposefully directed its activities toward the forum state. *See Mavrix Photo,*  
25 *Inc., v. Brand Techs., Inc.*, 647 F.3d 1218, 1227-28 (9th Cir. 2011). Under Ninth Circuit law,  
26 courts “generally apply the purposeful availment test when the underlying claims arise from a  
27 contract, and the purposeful direction test when they arise from alleged tortious conduct.” *Morrill*  
28 *v. Scott Fin. Corp.*, 873 F.3d 1136, 1142 (9th Cir. 2017).

1        The instant case, which involves an alleged TCPA violation, is based on a tort, not a  
2 contract, and thus the purposeful direction should apply. At the hearing, Mr. Castillo conceded  
3 that he could not meet the purposeful direction test. Presumably, this concession was based on the  
4 fact that Caesars, which is located in Nevada, did not take any action itself in California. Nor was  
5 its conduct directed at California; Mr. Castillo was in Las Vegas when he received the unsolicited  
6 text message. *Cf. Walden v. Fiore*, 571 U.S. 277, 291 (2014) (noting that the defendant DEA  
7 agent's conduct – *i.e.*, seizing the claimants' cash at a Georgia airport – "occurred entirely in  
8 Georgia" and thus jurisdiction in Nevada was lacking). Mr. Castillo argues, however, that, under  
9 *Freestream Aircraft (Berm.) Ltd. v. Aero Law Group*, 905 F.3d 597, 603 (9th Cir. 2018), he has  
10 established the necessary purposeful act. Alternatively, he asserts that he has met the purposeful  
11 availment test, which although generally applied in contract cases has, in some instances, been  
12 used in tort cases.

13        Contrary to what Mr. Castillo suggests, *Freestream* does not establish a basis for specific  
14 jurisdiction in tort cases separate from the purposeful direction test. In *Freestream*, the Ninth  
15 Circuit simply found that, in the case before it, a purposeful act had been committed in the forum  
16 state because the defendants had allegedly committed the intentional tort of defamation while  
17 present in the forum state. *See id.* at 603. Here, as noted above, there is no real dispute that  
18 Caesars never took any action itself in California, and its conduct was not aimed or directed at  
19 California.

20        Mr. Castillo's position, therefore, rests on the contention that, even though Caesars itself is  
21 based in Nevada, GoMoment took action on behalf of Caesars in California, and GoMoment's  
22 contacts with California may be attributed to Caesars. Mr. Castillo thus asserts an agency theory  
23 to establish purposeful direction. Mr. Castillo's purposeful availment argument also relates to an  
24 agency theory because Mr. Castillo is not arguing that Caesars purposefully availed itself of the  
25 privilege of conducting activities in California by contracting with him<sup>1</sup> but rather because it

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28        <sup>1</sup> The purposeful availment analysis is most often applied to a contractual dispute between the  
plaintiff and defendant. *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

1 contracted with GoMoment.<sup>2</sup>

2 The current state of the law is not entirely clear on the issue of whether and, if so, when  
3 an agent's contacts may be attributed to its principal for jurisdictional purposes. *Daimler AG v.*  
4 *Bauman*, 751 U.S. 117 (2014), indicates it is possible to use an agency relationship to establish  
5 specific jurisdiction, *see id.* at 135 n.13 (stating that “[a]gency relationships . . . may be relevant to  
6 the existence of specific jurisdiction” – *e.g.*, “a corporation can purposefully avail itself of a forum  
7 by directing its agents or distributors to take action there”) (emphasis omitted), and the Ninth  
8 Circuit has not suggested otherwise. But neither the Supreme Court nor the Ninth Circuit has  
9 provided guidance as to, under what circumstances, it is appropriate to attribute contacts. At best,  
10 the Ninth Circuit has indicated that one specific approach it had adopted prior to *Daimler* is no  
11 longer valid. *See Williams v. Yahama Motor Co.*, 851 F.3d 1015, 1024 (9th Cir. 2017) (indicating  
12 that, post-*Daimler*, the following test cannot be used for general *or* specific jurisdiction – *i.e.*,  
13 “whether the [agent] ‘performs services that are sufficiently important to the [principal] that if [the  
14 principal] did not have a representative to perform them, the [principal’s] own officials would  
15 undertake to perform substantially similar services’”).

16 However, even assuming in Mr. Castillo's favor that attribution of an agent's contacts is  
17 permissible, Mr. Castillo has failed to make out a *prima facie* case of specific jurisdiction. As  
18 alleged in the complaint, GoMoment may have assisted Caesars in developing and maintaining the  
19 platform used to transmit the text in question. But nothing in the complaint indicates that  
20 GoMoment played anything more than this very limited role. The actual implementation of the  
21 platform and the use of the platform were all done by Caesars in Nevada. *See* Compl. ¶ 11  
22 (quoting Caesars's Chief Experience Officer, Michael Marino, on the collaboration between  
23 Caesars and GoMoment: “[GoMoment has] a tried and true execution plan that allows us to launch  
24 Ivy at a property with less than a month lead time[;] [t]he set-up is fairly straightforward with  
25 drafting answers to the common questions *that we train Ivy on* in the IBM Watson platform,

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27 <sup>2</sup> For purposes of this opinion, the Court assumes, in Mr. Castillo's favor, that the purposeful  
28 availment test may be used in tort cases, and not just contract cases. *See, e.g., Valentine v.*  
*Nebuad, Inc.*, No. C08-05113 TEH, 2009 U.S. Dist. LEXIS 93454 (N.D. Cal. Oct. 6, 2009)  
(applying the purposeful availment test in a tort case).

1        *setting up user accounts and conducting the on-site trainings for the agents”*) (emphasis added).  
2        Thus, the relevant contacts with respect to the alleged misconduct in the instant case were all those  
3        of the principal (Caesars); the role of GoMoment in the effectuation of the contact with Mr.  
4        Castillo was attenuated.<sup>3</sup> *Compare Valentine*, 2009 U.S. Dist. LEXIS 93454, at \*24 (holding that  
5        the economic reality was that much of the misconduct took place in the forum state where the  
6        agent/co-defendant acted on the behalf of other defendants). *See also Walden*, 571 U.S. at 285  
7        (noting that “we have upheld the assertion of jurisdiction over defendants who have purposefully  
8        ‘reach[ed] out beyond’ their State and into another by, for example, entering a contractual  
9        relationship that ‘envisioned *continuing and wide-reaching contacts*’ in the forum State, or by  
10        circulating magazines to ‘*deliberately exploi[t]* a market in the forum State”) (emphasis added).  
11        Several district courts have refused to find personal jurisdiction over an out-of-state defendant  
12        simply because the defendant used a platform that was developed and maintained by an in-state  
13        third party. *See, e.g., Smith v. Facebook, Inc.*, 262 F. Supp. 3d 943, 948-52 (N.D. Cal. 2017)  
14        (declining jurisdiction over out-of-state website operators using embedded codes from Facebook  
15        to track patrons’ browsing histories even though Facebook was based in California); *OOO*  
16        *Brunswick Rail Mgmt. v. Sultanov*, Case No. No. 5:17-cv-00017-EJD, 2017 WL 264047 (N.D.  
17        Cal. Jan. 20, 2017) (declining jurisdiction over Gmail users based solely on use of Google’s  
18        product).

19        The Ninth Circuit’s *Morrill* decision is also instructive. In *Morrill*, the plaintiffs were an  
20        attorney and the law firm where he practiced. The plaintiffs were based in Arizona. They  
21        represented certain individuals and entities in connection with a construction project in Nevada.  
22        The plaintiffs’ clients filed a civil action in Nevada related to the construction project, and the  
23        plaintiffs were counsel in that action. According to the plaintiffs, the defendants in the Nevada  
24        civil action, as well as their lawyers, engaged in a campaign to harm the plaintiffs in retaliation for

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26        <sup>3</sup> Mr. Castillo’s claim – made in his papers, not the complaint – that GoMoment had servers in  
27        California and that those servers were used to send the unsolicited text messages does not affect  
28        this analysis. *Cf. Morrill*, 873 F.3d at 1146-47 (noting that physical entry into the forum state is a  
      relevant contact but “physical entry that is merely incidental to an out-of-state transaction does not  
      satisfy the constitutional minimum contacts requirement”).

1 their role as counsel. For example, the defendants and their lawyers initiated proceedings in  
2 Arizona, where the plaintiffs were located, to take the plaintiffs' deposition. The defendants also  
3 brought a separate defamation action against the plaintiffs in Nevada. Based on the conduct of the  
4 defendants and their lawyers, the plaintiffs brought a lawsuit against them in Arizona, claiming  
5 abuse of process and wrongful institution of civil proceedings. The defendants and their lawyers  
6 moved to dismiss for lack of personal jurisdiction.

7 The plaintiffs argued that there was specific jurisdiction in Arizona because the defendants  
8 and their lawyers had committed intentional acts expressly aimed at Arizona – *e.g.*, they had made  
9 phone calls and sent emails to plaintiffs in Arizona, they had initiated proceedings in Arizona to  
10 take the plaintiffs' depositions, and they had served the Nevada defamation complaint on the  
11 plaintiffs in Arizona. The Ninth Circuit upheld the district court's ruling that this was not  
12 sufficient to establish specific jurisdiction. It underscored that, per the Supreme Court's *Walden*  
13 decision, *see Walden* 134 S. Ct. at 1115, “the ‘mere fact that [a defendant’s] conduct affected

14 plaintiffs with connections to the forum State does not suffice to authorize jurisdiction.’” *Morrill*,  
15 873 F.3d at 1143. It also noted that, in *Calder v. Jones*, 465 U.S. 783 (1984), a defamation case,  
16 specific jurisdiction did not turn simply on the fact that the plaintiff, who was based in the forum  
17 state, had suffered harm in the forum state. Rather, what was important was the fact that the  
18 defendants had published the allegedly defamatory statements in the forum state.

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20 Here, by contrast, Plaintiffs elected to work outside of [the forum  
21 state] Arizona in order to participate as counsel in the [construction  
22 project] Tharaldson Litigation that was conducted in Nevada. The  
23 allegedly tortious conduct [by the defendants and their lawyers]  
24 involved very limited communications and proceedings in Arizona,  
25 all of which arose out of and were component parts in the litigation  
26 in Nevada. Any links to Arizona, which included Defendants'  
27 communications with Plaintiffs by telephone and email about the  
Tharaldson Litigation, occurred only because it happened to be  
where Plaintiffs resided. The primary effects of Defendants'  
actions, including the alleged harm, were tied directly to the  
litigation in Nevada. . . . [E]ven the deposition subpoena process [in  
Arizona], which is a significant basis for Plaintiffs' claim of  
jurisdiction in Arizona, was [ultimately and] definitively adjudicated  
in Nevada [because the Arizona court quashed the subpoena but  
without prejudice to a de novo review by the Nevada court].

28 Because Defendants knew that Plaintiffs were from Arizona, it was

1 foreseeable that some injury to them could have been experienced  
2 there based on the actions taken by Defendants in connection with  
3 the Tharaldson Litigation. Harm suffered in the forum state is a  
4 necessary element in establishing purposeful direction. However,  
5 the potential foreseeability of some incidental harm to Plaintiffs in  
6 Arizona due to substantial litigation that was pending in Nevada,  
7 without more, does not show that Defendants expressly targeted the  
8 forum state. “Such reasoning improperly attributes a plaintiff’s  
9 forum connections to the defendant and makes those connections  
10 ‘decisive’ in the jurisdictional analysis. *It also obscures the reality*  
11 *that none of [the] challenged conduct had anything to do with [the*  
12 *forum state] itself.*” *Calder* adopted the rule that to establish the  
13 basis for specific personal jurisdiction, a tort must involve the forum  
14 state itself, and not just have some effect on a party who resides  
15 there.

16 *Id.* at 1144-45 (emphasis added).

17 Similar to *Morrill*, the reality in the instant case is that the alleged misconduct had little or  
18 nothing to do California but rather was tied to Nevada. Although GoMoment, which is based in  
19 California, developed and maintained the Ivy platform, it was Caesars that implemented and used  
20 the platform in Nevada to commit the alleged TCPA violation. *See Compl. ¶ 11.* The fact that  
21 GoMoment’s corporate headquarters are in California neither informed nor influenced any aspect  
22 of this litigation; the location of GoMoment’s headquarters is merely a happenstance. *See Morrill*,  
23 873 F.3d. at 1145; *see also Walden*, 571 U.S. at 286 (noting that “[d]ue process requires that a  
24 defendant be haled into court in a forum State based on his own affiliation with the State, not  
25 based on the random, fortuitous, or attenuated contacts he makes by interacting with other persons  
26 affiliated with the State”) (internal quotation marks omitted).

27 For the foregoing reasons, the Court holds that Mr. Castillo has failed to make a *prima  
28 facie* showing of personal jurisdiction. The Court, however, does not dismiss the action based on  
the lack of personal jurisdiction because 28 U.S.C. C. § 1631 allows this Court to transfer as an  
alternative to dismissal. Section 1631 provides that, when “a court finds that there is a want of  
jurisdiction” over a civil action, “the court shall, if it is in the interest of justice, transfer such  
action or appeal to any other such court in which the action or appeal could have been brought at  
the time it was filed or noticed.” 28 U.S.C. § 1631. The Ninth Circuit has held that “transfer will  
generally be in the interest of justice, unless it is apparent that the matter to be transferred is  
frivolous or was filed in bad faith.” *Amity Rubberized Pen Co. v. Market Quest Grp., Inc.*, 793

1 F.3d 991, 996-97 (9th Cir. 2015) (transferring a patent case over which the Ninth Circuit had no  
2 jurisdiction to the Federal Circuit); *see also Gray & Co. v. Firstenberg Machinery Co.*, 913 F.2d  
3 758, 761-62 (9th Cir. 1990) (finding lack of personal jurisdiction but transferring to Illinois  
4 pursuant to § 1631).<sup>4</sup>

5 In the instant case, there is no dispute that the District of Nevada has personal jurisdiction  
6 over Caesars. Moreover, there is no real dispute that a significant part of the events took place in  
7 Nevada, including but not limited to Caesars's decision to send the text messages and the receipt  
8 of those text messages by guests after checking into the Caesars hotel. Finally, there is no  
9 apparent frivolousness or bad faith with respect to Mr. Castillo's claims. A transfer to the District  
10 of Nevada is therefore appropriate.

11 Finally, the Court notes that, even if it *did* have personal jurisdiction over Caesars with  
12 respect to the instant case, it would still find a transfer to the District of Nevada proper pursuant to  
13 28 U.S.C. § 1404(a). Under § 1404(a), “[f]or the convenience of parties and witnesses, in the  
14 interest of justice, a district court may transfer any civil action to any other district or division  
15 where it might have been brought . . . .” 28 U.S.C. § 1404(a). As indicated above, there is no  
16 dispute in the instant case that Mr. Castillo could have brought his lawsuit in the District of  
17 Nevada. And the factors typically considered in a § 1404(a) analysis weigh in favor of transfer.  
18 *See Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000) (listing factors); *Vu v.*  
19 *Ortho-McNeil Pharm., Inc.*, 602 F.Supp.2d 1151, 1156 (N.D. Cal. 2009) (same).

20 For example, although a plaintiff's choice of forum is typically afforded deference, such  
21 deference is not owed where the plaintiff brings a class action, the plaintiff does not reside in the  
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23 <sup>4</sup> At the hearing, the Court referenced transfer pursuant to 28 U.S.C. § 1406 rather than § 1631.  
24 Section 1406 provides in relevant part as follows: “The district court of a district in which is filed  
25 a case laying venue in the wrong division or district shall dismiss or, if it be in the interest of  
26 justice, transfer such case to any district or division in which it could have been brought.” 28  
27 U.S.C. § 1406(a). Although the statute refers to improper venue, the Supreme Court indicated that  
28 “[t]he language of § 1406(a) is amply broad enough to authorize the transfer of cases, however  
wrong the plaintiff may have been in filing his case as to venue, whether the court in which it was  
filed had personal jurisdiction over the defendants or not.” *Goldlawr, Inc. v. Heiman*, 369 U.S.  
463, 466 (1962). In light of the Ninth Circuit's decision in *Gray*, however, the Court transfers  
pursuant to § 1631 but notes that the “interest of justice” standard applies to both § 1406 and §  
1631.

1 forum, and/or no relevant action took place in the forum. *See Lou v. Belzberg*, 834 F.2d 730, 739  
2 (9th Cir. 1987) (noting that, “[w]hen an individual brings a derivative suit or represents a class, the  
3 named plaintiff’s choice of forum is given less weight”); *Pac. Car & Foundry Co. v. Pence*, 403  
4 F.2d 949, 954 (9th Cir. 1968) (indicating that a plaintiff’s choice of forum receives “minimal  
5 consideration” when the forum has no relation to the operative facts of the case and no specific  
6 interest in the parties or subject matter); *Young v. Wells Fargo & Co.*, No. C 08-3735 SI, 2008 WL  
7 5245894, at \*3 (N.D. Cal. Dec. 17, 2008) (noting that a court may give a plaintiff’s choice of  
8 forum “considerably less weight” when he does not reside in the forum). All three of these  
9 considerations factor into the instant case: Mr. Castillo is bringing a nationwide class action; he  
10 resides in the Central District of California, not the Northern District; and the relevant events took  
11 place in the District of Nevada, not the Northern District of California.

12 Mr. Castillo argues that convenience of the witnesses weighs in favor of the Northern  
13 District of California because GoMoment is located in the Central District of California and it  
14 would prefer a forum in California rather than an out-of-state forum (*i.e.*, the District of Nevada).  
15 But while GoMoment may well be a witness in the instant case, it does not appear to be a crucial  
16 witness because, as alleged in the complaint, it simply provided a platform for Caesars to use and  
17 nothing more. The critical witnesses will be Caesars’s employees – *e.g.*, those who made the  
18 decision to send the text messages.

19 **III. CONCLUSION**

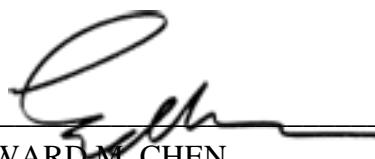
20 For the foregoing reasons, Defendants’ motion to dismiss is denied and the Court transfers  
21 the instant case to the District of Nevada. The Clerk of the Court is ordered to immediately  
22 effectuate the transfer of this case.

23 This order disposes of Docket No. 20.

24 **IT IS SO ORDERED.**

25 Dated: November 28, 2018

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EDWARD M. CHEN  
United States District Judge